Supreme Court, U.S.
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No. 92-1506

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

CITY OF LAWRENCEVILLE, GEORGIA; BARTOW JENKINS, Mayor, SONNY BRAND, MAHLON BURSON, RAY OAKES and G. MICHAEL CROW, SR., Members of the City Council for the City of Lawrenceville, Georgia; and BRADFORD P. LEONARD, Director, Planning, Zoning and Inspections

Petitioners,

v.

GWINNETT 316 ASSOCIATES,
A Georgia General Partnership,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of Georgia

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a city ordinance which requires an industrial park developer to include a proposed city street on a conceptual sketch plan of a future development is an unconstitutional taking of private property under the Fifth and Fourteenth Amendments or is a legitimate exercise of the police power?

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PETITION FOR WRIT OF CERTIORARI

Petitioners, City of Lawrenceville, Georgia, et al. ("City") respectfully petition for a writ of certiorari to review the decision of the Supreme Court of the State of Georgia in this case.

OPINIONS BELOW

The Order of the Supreme Court of the State of Georgia is reprinted as Appendix A to this Petition. The Order of the Superior Court of Gwinnett County, the trial court in this case, is reprinted as Appendix B to this Petition. The Order of the Supreme Court of the State of Georgia denying the Motion for Reconsideration is

reprinted as Appendix C. The Finding of Fact and Conclusions of Law of the Mayor and Council of Lawrenceville is reprinted as Appendix E.

JURISDICTION

The Order of the Supreme Court of the State of Georgia, the highest court of the State, affirmed the decision of the trial court below without an opinion on November 19, 1992. The Petitioner's Motion for Reconsideration was denied by the Georgia Supreme Court on December 17, 1992. The jurisdiction of this Court rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fifth and the Fourteenth Amendments to the United States Constitution. The relevant portion of the Fifth Amendment provides ". . . nor shall private property be taken for public use, without just compensation." The relevant portion of the Fourteenth Amendment provides "No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. Amend. V and Amend. XIV.

STATEMENT OF THE CASE

1. *Statement of the Facts*

In the 1980's, Gwinnett County, Georgia was the fastest growing county in the United States. The City of Lawrenceville is the county seat and largest muncipality in Gwinnett County. The City government struggled to keep pace with the flood of development which poured into the area during that decade. One tool the local governments employed in an attempt to impose order on such growth was the adoption of a Long Range Road Classi-

fication Map ("Road Map"). In 1987, as the Road Map was being assembled, Gwinnett County officials met with local developers to coordinate the placement of roads with the projected needs which would be created by development.[1] (Trial Record at 349, 353, hereinafter R-349,353.) In its final form, the Road Map included existing highways, along with proposed projects and extensions. One such proposed road became known as the Lawrenceville Loop Road (hereinafter "Loop Road"), a four lane highway running north to south in a circular fashion around the east side of the City (Plaintiff's Exhibit 24). The proposed Loop Road is designated to pass through the City limits and across the property owned by the Respondent.

To implement the planning function of the Road Map, on March 7, 1988, the City of Lawrenceville passed a resolution which amended the Subdivision Regulations and required developers to show major arterials and public thoroughfares which appear on the Road Map on

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[1] Before the road at issue in this case was included on the Road Map, County officials met with the Respondent. The Respondent insisted that this project be placed on the Long Range Road Classification Map and repeatedly expressed its enthusiastic support for the County bringing the road through its property. (R-145-150) County officials relied upon statistics provided by the Respondent in determining the need for the road. (R-147, 353, 355)

In a letter dated February 8, 1989, the Respondent projected its development's impact on the City of Lawrenceville's road system in terms of the number of trips generated by its development as follows:

Gwinnett 316
Total Daily Incoming and Outgoing Traffic

	January 1, 1989 Estimate	January 1, 1995 Projection	January 1, 2000 Projection
Car Traffic	1,140	7,700	11,000
Truck Traffic	640	4,760	6,800
Total Traffic	1,780	12,460	17,800

their sketch plats.[2] (City Exhibit 4, the relevant portions of the City of Lawrenceville Subdivision Regulations are reprinted as Appendix D.) Under the Subdivision Regulations, sketch plat submission is the first step in the permitting process in construction of an industrial park. (Transcript of January 13, 1992 hearing at p. 64.) To carry out the planning purpose of the Road Map, the Subdivision Regulations require the Respondent to incorporate all proposed roadways in its sketch plat.

The Respondent is a Georgia general partnership formed to develop an industrial park comprised primarily of distribution centers for industrial manufactures. The Respondent's industrial park contains 342 acres of propperty zoned for heavy manufacturing. This industrial park, which is adjacent to Georgia Highway 316, but has no direct access to that expressway, is served only by a single two lane road.

In 1985, the Respondent won approval of a sketch plat for Phase I of its industrial park, which did not concern the Loop Road. In amending the sketch plat of Phase I, the Respondent repeatedly showed the Loop Road on its plats. (Defendant's Exhibit 15, Plaintiff's Exhibits 11, 14 and 14B.) Phase I construction was completed in compliance with the City's Subdivision Regulations in 1985. When the sketch plat for Phase II of the development was tendered, the Respondent refused to show and plan for the Lawrenceville Loop Road on the sketch plat. (Plaintiff's Exhibit 23 is the sketch plat currently in issue.)

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[2] Article IV, Section 4.2(2), and 4.3 of the City Subdivision Regulations list the procedures the Respondent was to follow in building its industrial subdivision. Section 4.3 lists the procedure the Respondent used to submit a sketch plat to the City. Section 4.3 (2)(A) also describes the procedure under which a sketch plat is reviewed by the City Council after it is reviewed by the Planning Commission. (January 13, 1992 Transcript at 64-66) Only after sketch plat approval do the other provisions of the subdivision regulations apply.

In 1989, the City's Planning Commission and City Council rejected the Respondent's sketch plat because it showed an internal road system which would have intersected with the proposed Loop Road an angles which were hazardous. (T-376, Defendant's Exhibit 11, also marked as Plaintiff's Exhibit 10.)

2. *The Decision of the Superior Court of Gwinnett County*

After that sketch plat was denied, the Respondent applied to the Superior Court of Gwinnett County for a writ of mandamus ordering the City to approve the sketch plat. After hearing evidence and argument, the Gwinnett County Superior Court remanded and dismissed the Respondent's action against the City, finding that the specific reasons for the City's disapproval of the original sketch plat were unclear in the record and that it was also unclear as to whether the Plaintiff had exhausted its administrative remedies prior to seeking mandamus, as required by Georgia law. (R-626-627)

In remanding the case, the trial court ordered that all administrative and appellate entites of the City of Lawrenceville provide a transcript of all public hearings on the matter before them and ordered the City to enter findings of fact and conclusions of law upon its final adjudication of the matter. The findings of fact and conclusions of law of the Mayor and Council are reprinted as Appendix E.

After remand, the Respondent submitted a second sketch plat which did not depict the Lawrenceville Loop Road at all. On July 24, 1991, the Mayor and Council heard evidence from representatives of the County Planning and Transportation Departments regarding the purpose of the Subdivision Regulations for planning to provide safe roadways and to meet the needs of growth. (R-312-320, 334-337, 338-359) The Council heard testimony regarding the existing traffic hazards on streets and interchanges leading to and from the Respondent's prop-

erty; the benefits of the Loop Road would provide the Respondent by increasing the value of its property; and the direct access the Loop Road would provide the Respondent to Highway 316 creating corner sites adjacent to a limited access expressway. (R-364-367, 368-371) The Council heard testimony about the projected benefits to the Respondent since construction of the Loop Road would provide direct access from the Respondent's Industrial Park to State Highway 316 and result in an increase in the value of the Respondent's property. The Respondent presented no responsive evidence before the Mayor and Council.

After hearing all of the evidence, the Council voted unanimously to refuse to approve the sketch plat. (R-396) The Mayor and Council concluded that the Subdivision Regulations only required the Respondent to show the proposed Loop Road on its sketch plat and ruled that the issue of road dedication or donation was not before them.

The Respondent filed suit in Gwinnett County Superior Court for a second time, seeking a writ of mandamus and seeking to have the Subdivision Regulations declared unconstitutional. The trial court ruled that the City's refusal to approve the Respondent's sketch plat was unconstitutional and violative of the "takings clauses" of the Federal and State Constitutions. (R-480) The Court also ruled that the Subdivision Regulations which required the City to withhold approval of the Respondent's sketch plat were unconstitutional. (R-482) The Court then granted the Respondents a writ of mandamus for approval of its sketch plat and dismissed all other requests for relief as moot. (R-482-83)

3. *The Decision of the Supreme Court of the State of Georgia*

The Georgia Supreme Court affirmed the decision of the trial court without opinion on November 19, 1992. The Georgia Supreme Court denied the Petitioner's Motion for Reconsideration on December 23, 1992.

REASONS FOR GRANTING THE WRIT

I. THE CONSTITUTIONAL ISSUE IS IMPORTANT TO THE PUBLIC AND AFFECTS THE ABILITY OF LOCAL GOVERNMENTS TO PLAN SAFE AND EFFICIENT ROADS.

The public policy burdening local governments with responsibility to develop plans for future roads is a necessary governmental function substantially related to the protection of the public health, safety, and welfare. The City regulations requiring the Respondent to plan and coordinate its street construction with future roads should have been affirmed by the trial court as a legitimate exercise of that police power. Ignoring the analysis of *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), the Supreme Court of Georgia in this case held the City planning regulations unconstitutional.

The public interest which has been deemed unconstitutional by the lower court's orders is the ability of local governments to plan safe and efficient roads for the future. There is no greater function of local government than to provide citizens with safe roads. Every segment of modern society depends on public streets and highways for private and commercial transportation. If roads are not properly planned and constructed, citizens are injured and killed. Inefficient transportation of products also causes economic loss to manufacturers, retailers and consumers. If planning for future roadway needs is not begun today it will be too late for local governments to plan, design, or properly build safe roadways once developers have constructed buildings and other improvements in the optimal locations for roads.

Given the lower courts' decisions in this case, the ability of local governments in Georgia to enact ordinances and statutes to plan and design public roads and streets for its citizens is in jeopardy. The decision has effectively rendered the City's (and Gwinnett County's) Long Range Road Classification system worthless, and under this de-

cision, a local government could only plan roads if it had the money to acquire the right of way immediately. Because of the effect of land use and development upon street traffic and transportation, a coordinated comprehensive plan for street and highway development is imperative for the creation of safe and efficient transportation systems. The lower court's decisions have crippled the City's ability to carry out its policy of implementing such a system.

This simple policy was clearly and convincingly explained at the July 24, 1991 hearing before the Mayor and Council of the City of Lawrenceville. At this hearing Bill Powell, the Assistant Director of the Gwinnett County Transportation Department explained the need and the purpose of the Long Range Road Classification Map. (T. 20-46) Mr. Powell testified that the current road system supporting the area of Respondent's industrial park was inadequate and over taxed by traffic from the Respondent's development and other sources. (T. 21-22, 28-29, 42-43) Mr. Powell explained that the location of the Loop Road at the Respondent's property was necessary because of the amount of development in the area, safety factors arising because of that development, and engineering requirements for designing and building the road property. (T. 24-26) Finally, Mr. Powell testified that the proposed roadway would cross 18 acres of the 342 acre industrial park and further that the Respondent would benefit from the presence of the Road by gaining direct access to the undeveloped part of the industrial park and State Highway 316. (T. 27, 34-46)

Gary Cornell, the Gwinnett County Director of Planning, also testified at the July 24, 1991 hearing on the governmental purpose of road planning. (T. 46-67) Mr. Cornell testified that long range road planning was necessary to coordinate road design and construction among local governments, between local governments and private developers and among private developers. (T. 53-

56) Mr. Cornell testified that other developers had worked with Gwinnett County within the planning regulations to construct safe and efficient roads.

Without an enforceable planning regulation, like the one deemed by the trial court to be unconstitutional in this case, a single developer like the Respondent is able to render the public interest in safe and efficient roads impossible to accomplish by needlessly placing its development in the way of a proposed road. An important public and governmental interest has been infringed upon by the trial court, and only this Supreme Court is able to restore the ability of local government to exercise the police power to plan necessary road improvements.

II. THE SUPREME COURT OF GEORGIA AND THE TRIAL COURT WERE WRONG IN DETERMINING THAT THE CITY REGULATION REQUIRING A DEVELOPER TO INCORPORATE A PROPOSED ROAD INTO ITS SKETCH PLAN WAS AN UNCONSTITUTIONAL TAKING RATHER THAN A LEGITIMATE USE OF THE POLICE POWER.

A. Regulating the Planning and Construction of Roads Is an Appropriate Exercise of the Police Power by a City.

The City of Lawrenceville appropriately exercised the police power because there is a direct link between the City's rsponsibility to plan safe and efficient roads and the subdivision regulations designed to carry out the planning of these roads. Moreover, the City's refusal to approve the Respondent developer's sketch plan was proper because of the adverse impact the development of Phase II of the industrial park would have on the future road plan of the City. More construction without the necessary roads to support this development would obliterate the City's ability to maintain safe and adequate transportation inside its own boundaries.

In several letters to City and County officials, the Respondent candidly discussed the impact the construction

of its project would have on the City's road system. The Respondent estimated that by 1995, a total of 12,460 vehicles would be going in and out of its complex each day. That number would increase to 17,800 vehicle trips per day by the year 2000. The Long Rang Road Classification Map and the City's Subdivision Regulations enforcing it were designed specifically to insure the adequate plan and design of streets to meet traffic needs including those of the Respondent's 342 acre industrial park.

B. The Georgia Courts Did Not Consider the Correct Constitutional Analysis of *Nollan v. California Coastal Commission*, in Determining Whether the City's Road Plan Was A Proper Exercise of the Police Power.

In 1987, the United States Supreme Court issued a decision in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) which established the correct analysis for review of the exercise of the police power. The *Nollan* case affirmed the long recognized precedent that land-use regulation does not effect a taking if it "substantially advances legitimate state interest" and does not "deny an owner economically viable use of his land." *Nollan* at 834 citing *Agins v. Tiburson*, 447 U.S. 225, 260 (1980) (upholding scenic zoning); *Penn Central Transportation Co. v. City of New York*, 483 U.S. 104, 127 (1978) (upholding landmark preservation); *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (upholding zoning ordinances). *Nollan* recognizes a number of governmental regulations which meet the standard of substantially advancing a state interest.

Nollan holds that a regulation ". . . that serves the same legitimate police-power purpose as a refusal to issue the permit would not constitute a taking." *Nollan* at 836. For its regulations to pass constitutional scrutiny, a local government must demonstrate a nexus between the regulation and the end advanced as the justification for the regulation.

In this case, the goal advanced is the design of safe, efficient and coordinated road systems. This goal is advanced by planning future road needs via the Long Range Road Classification Map. The Road Map is enforced by requiring the developer of property to include the proposed road in the conceptual planning of the development where the developer's property abuts the proposed road. Using the *Nollan* analysis, the alternative is to deny the development because the road system is too taxed to accommodate additional traffic. Unlike *Nollan*, no easement or dedication of title of the land to the City is required in conjunction with sketch plat approval. The City only requires that the internal streets and development be coordinated to accommodate the future construction of the road.

Because there is a direct link between the planning regulations and the end of having a coordinated safe and efficient road system, the regulations of the City are indeed constitutional exercises of the police power.

1. *Because the City regulations do not deny the Respondents all economically viable use of its land, the state courts' reliance on* Lucas v. South Carolina Coastal Council *and* Lamar Advertising v. City of Albany *is error.*

In 1992, this Supreme Court held that regulations that deny a property owner *all* economically viable use of his land is a taking in violation of the Fifth and Fourteenth Amendments to the United States Constitution. *Lucas v. South Carolina Coastal Council*, 505 U.S. ——, 112 S.Ct. 2886 (1992). In this case, the City requires only the drawing of the road on a conceptual sketch plat. There is no physical invasion of the Respondent's property. The planning required does not preclude the Respondent from using its land for the development of an industrial park or any other purpose. The only limitation on the Respondent is that the internal street design of the industrial park be coordinated to accommodate the proposed

Loop Road. The Respondent's park contains 342 acres of land to be developed. The Loop Road will affect only a total of 18 acres of land, most of which would be required for internal street construction anyway. Under these facts, the *Lucas* case and the *Lamar* case do not apply.

2. ***The facts of this case provide the Supreme Court with an opportunity to reaffirm the standard for local government use of the police power in the context of* Nollan *and* Lucas.**

The design of safe and efficient roads is the most important function of local government. Adequate roads are essential for delivering fire or police protection and coordinating commerce. Following the Supreme Court's rulings in *Lucas* and *Nollan*, which set limits on the exercise of the police power, local governments have become reluctant to perform basic functions that are critical to their citizens. This case provides the *Court* with an opportunity to clearly define the principles announced in *Nollan*.

ALTERNATIVE PRAYER

As an alternative to the granting the writ at this time, the City respectfully requests the Court to remand this case to the Supreme Court of Georgia for the purpose of writing a full decision on this important issue. No case directly defines a local government's ability to exercise the police power to plan safe and efficient roads in Georgia. The Georgia Supreme Court, in the context of conditional zoning, has held that the planning and design of efficient roads is a legitimate exercise of the police power. *Cross v. Hall County*, 238 Ga. 709, 235 S.E.2d 379 (1977); *Johnson v. Glenn*, 246 Ga. 685, 273 S.E.2d 1 (1980). No reported case in Georgia defines the scope of local government's police power to plan and design roads under the United States and State Constitutions. Once a full decision is rendered, then the City respect-

fully urges the Court to grant certiorari to review these important questions.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE SUPREME COURT OF GEORGIA

S92A0966

CITY OF LAWRENCEVILLE, GEORGIA, *et al.*,

v.

GWINNETT 316 ASSOCIATES

Decided: Nov. 19, 1992

PER CURIAM:

Judgment affirmed without opinion pursuant to Rule 59. Clarke, C.J., Bell, P.J., Hunt, Benham, Fletcher and Sears-Collins, JJ., concur.

APPENDIX B

IN THE SUPERIOR COURT
OF GWINNETT COUNTY
STATE OF GEORGIA

Civil Action File No. 91-A-05023-3

GWINNETT 316 ASSOCIATES,
A Georgia General Partnership,
Plaintiff,

v.

CITY OF LAWRENCEVILLE, GEORGIA, *et al.*,
Defendants.

FINAL ORDER AND JUDGMENT

[Filed Feb. 14, 1992]

This case having come on for a bench trial on January 24, 1992, and this Court having considered the evidence, record, arguments, briefs of counsel and matters properly before this Court for consideration; It is hereby ordered that Plaintiff's Application for Mandamus and Other Relief is GRANTED as hereinafter set out.

FINDINGS OF FACT

The original sketch plat [1] for the development of Plaintiff's property [2], which was and is zoned to the HM

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[1] Under the City of Lawrenceville's Zoning Ordinance and Subdivision Regulations, as amended, the procedure for the subdivision and development of real property begins with the submittal, in accordance with Sections 2.1, 4.1 and 5.2 of the Subdivision Regulations, of a Sketch Plat. No subdivision of property or subsequent development can take place without the City's approval of the necessary road systems and that approval involves the platting process which beings with Sketch Plat approval.

[2] Plaintiff owns approximately 350 acres of land in the City of Lawrenceville located between State Highway 316 and Old Norcross Road.

(heavy manufacturing) zoning district in accordance with the provisions of the City of Lawrenceville Zoning Ordinance, was submitted to and approved by the City of Lawrenceville on November 25, 1985. Defendants approved the original sketch plat for industrial warehouse development. Plaintiff relied upon the approval, expending substantial sums in developing approximately 150 acres as Phase I and preparing for the development of Phase II of Gwinnett 316 Industrial Park ("Gwinnett 316"). Subsequent to Defendants' approval of the 1985 sketch plat and subsequent to substantial development by Plaintiff, Gwinnett County developed plans for additional regional roadway systems, including the proposed Lawrenceville Loop ("Loop" or "Loop road"), and added the proposed Loop to its Long-Range Road Classification Map. That plan was later adopted by the City of Lawrenceville.

The instant case is the renewal of a suit commenced December 11, 1990 involving the same parties and substantially the same issues which this Court remanded for further proceedings before the City of Lawrenceville on March 27, 1991.[3] This Court directed Defendants to reconsider Plaintiff's application for approval of the proposed sketch plat for the development of Phase II of Gwinnett 316. Defendants had rejected the application that Plaintiff needed to develop Phase II of the industrial park, and this Court was concerned that the reasons for the denial had not been clearly established.

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[3] The first action resulted from Lawrenceville's denial of sketch plat approval for Phase II of Gwinnett 316. Plaintiff had submitted a sketch plat for review which did not set out the proposed location for the unfunded and incompletely designed Lawrenceville Loop, and the City's planning staff recommended denial to the Planning Commission which denied approval. Thereafter Plaintiff amended its sketch plat to show the proposed Loop road, and the resubmitted sketch plat was also denied by the City because the proposed Phase II road system would conflict with the proposed design for the Loop road.

Plaintiff complied with the Order of March 27, 1991 and resubmitted the Phase II proposed sketch plat to Defendants for reconsideration and review. Additionally, Plaintiff again challenged the constitutionality of the Lawrenceville Subdivision Regulations and Zoning Ordinance facially and as applied to its property. The City of Lawrenceville Planning Commission refused to approve the resubmitted sketch plat on May 13, 1991 because the right-of-way for the proposed Loop was not specifically set forth on the sketch plat.

Thereafter, the Mayor and Council amended the Subdivision Regulations to delete one requirement which the Plaintiff had challenged as unconstitutional, but refused to delete the provisions requiring that proposed or future road systems shown on the Gwinnett County Long Range Road Classification Map be set out on sketch plats, reserved and dedicated by the property owner.[4] Once

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[4] The provisions of the City of Lawrenceville's Zoning Ordinance and Subdivision Regulations apply in concert. However, the Subdivision Regulations are primary in this case in light of the fact that the existing zoning classification of Plaintiff's property permits the type of use sought by Plaintiff.

Article I, § 1.4 of the Subdivision Regulations requires that proposed public improvements properly relate to proposals shown in the Land Use Plan; § 1.12 prohibits the issuance of any building permit if the proposed construction involves a lot or plat subdivided in violation of the Subdivision Regulations; no public road may be improved unless approved by the Planning Commission and Mayor, Article II, § 2.1, 4; no building permit can be issued for construction unless there is access to an approved street, § 2.1, 6; no permit for construction in a proposed subdivision can be issued until an application for subdivision has been submitted and approved in accordance with the procedure set out in Article IV of the Subdivision Regulations; rights-of-way for streets must be dedicated to the public use, Article VII, § 7.2, 1. A. 14; rights-of-way for all streets, existing or proposed, must be dedicated in accordance with the Long-Range Road Classification of the Gwinnett County Comprehensive Plan, § II, Amendment of July 16, 1990; the right-of-way to be dedicated is determined by reference to the Long-Range Road Classification Map of the Gwinnett County Compre-

shown, neither the Plaintiff or any other property owner so affected can build or develop in any manner which will interfere with the right-of-way or construction of any such proposed road. On July 24, 1991, the Mayor and City Council also refused to approve the sketch plat because the right-of-way for the proposed Lawrenceville Loop was not set forth thereon as required by Article V § 5.1(1.)(I) and (J) and Section III, paragraphs (a) and (d) of the July 16, 1990 Amendment of the City's Subdivision Regulations.

The sketch plat resubmitted by Plaintiff complied with all technical requirements of the City of Lawrenceville's Subdivision Regulations and Zoning Ordinance with the sole exception that the sketch plat did not show the proposed Lawrenceville Loop. Defendants will not approve any development in Gwinnett 316 that would conflict or interfere with the right-of-way for the development of the proposed Loop road.

The Lawrenceville Loop is unfunded and unscheduled for complete development and neither the City of Lawrenceville nor Gwinnett County have sufficient funds currently available for the purchase of the Loop right-of-way and construction of the road within Plaintiff's property.[5] Defendants have not acted to condemn or compensate Plaintiff in any manner for the proposed right-of-way for the proposed Loop. The right-of-way for the proposed Loop road constitutes approximately 18.5 acres of land, which bisects Phase II of the property, and

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hensive Plan, § III(a), Amendment of July 16, 1990; and any street or thoroughfare proposed by the Gwinnett County Compresensive Plan or the State of Georgia to adjoin or traverse the proposed subdivision development must be accommodated into the owner's development plan, § III(d), Amendment of July 16, 1990.

[5] The Court is further aware that the local option sales tax which was proposed to provide funds for the acquisition and construction of the Loop road and others was invalidated by an order of the Superior Court of Gwinnett County entered subsequent to the trial of this case.

Plaintiff has been denied the use of its property for more than two (2) years.[6] The refusal to approve the submitted sketch plat has impacted substantially more than just the 18.5 acres, more or less, which lie within the proposed right-of-way. It has impacted more than 90 additional acres of Plaintiff's property by rendering it undevelopable as a result of the serpentine shape of the proposed Loop and its proposed location along a ridge line within Gwinnett 316. As a result of the location and elevation of the proposed Loop road and the topography of Gwinnett 316, truck traffic would not be able to safety access a substantial portion of the development. Additionally, the approved plan for the Loop road provides for four lanes and a median as the road traverses Plaintiff's property. There are no median cuts or access points from the Loop road to the Gwinnett 316 property on the plan for the Loop road which has been approved.

The plan for the Lawrenceville Loop arose from the general increase in traffic in Gwinnett County and the City of Lawrenceville.[7] The public need for the Lawrenceville Loop was not created by the development of Gwinnett 316 for industrial warehouse development.

CONCLUSIONS OF LAW

Defendants' refusal pursuant to the provisions of the City of Lawrenceville's Subdivision Regulations to approve Plaintiff's sketch plat unless Plaintiff shows the proposed Loop road and thereafter reesrves and dedicates that right-of-way by designing and building around it violates the taking clauses of the federal and state constitutions. GA. CONST. of 1983, Article 1, § 3, ¶ 1; U.S. CONST. amends. V & XIV. This Court does not find De-

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[6] Negotiations between Plaintiff, Defendants and Gwinnett County have been ongoing for almost five years.

[7] The City of Lawrenceville, at page 4 of the Findings of Fact adopted by it, pointed out that Gwinnett County has been the fastest growing county in the United States; the county's population more than doubled from 160,000 in 1980 to 350,000 in 1990.

fendants' argument, that because there exists a public purpose—the construction of new roadways to lessen traffic congestion and its attendant ills—there is not a taking, to be persuasive. *Lamar Advertising v. City of Albany*, 260 Ga. 46, 47 n.1, 389 S.E.2d 216 (1990). Effectively, Defendants argue that the ends justify the means. This Court recognizes government's obligation to the public, but there is no nexus between the imposition of the condition that the right-of-way be reserved and dedicated and restricting development of Plaintiff's property. The real purpose of Defendants' witholding of sketch plat approval is to impermissibly obtain 18.5 acres of Plaintiff's property without compensating Plaintiff. *Nollan v. California Coastal Commission*, 483 U.S. 825, 837 (1987). *See also* O.C.G.A. §§ 36-7-1 to 13. Furthermore, it is significant to note that the Constitution of the State of Georgia offers its citizens greater rights and more benefits than does the federal constitution and mandates that the paramount duty of government is the protection of person and property. *Denton v. Kahn-Way Express, Inc.*, 402 S.E.2d 269 (1991).

Defendants may not condition the grant of sketch plat approval on the reservation of the Loop right-of-way. *Nollan*, 483 U.S. at 833-34 n.2 & 837-38 n.5. Even though government acts according to "a valid exercise of the police power," it still must pay just compensation when it takes land. *Lamar Advertising*, 260 Ga. 46, 47 n.1, 389 S.E.2d 216, 217 n.1 (1990) (citing *Nollan*, 483 U.S. 825). Furthermore, while a public purpose may exist, the means adopted by the City of Lawrenceville to accomplish that purpose is not reasonably necessary and is unduly oppressive upon the persons regulated. *Cannon v. Coweta County*, 260 Ga. 56, 389 S.E.2d 329 (1990).

Plaintiff has demonstrated a clear, legal right to approval of Plaintiff's sketch plat as resubmitted to Defendants. *Dougherty County v. Webb*, 256 Ga. 474, 350 S.E.2d 457 (1986). Defendants' denial of approval of

Plaintiff's sketch plat was also a gross abuse of Defendants' authority. *Id.* Plaintiff is entitled to a Writ of Mandamus compelling Defendants to approve Plaintiff's sketch plat so that Plaintiff may continue to develop Gwinnett 316 without setting aside or reserving the Loop road right-of-way.

Plaintiff was entitled to a *de novo* hearing of the evidence on the issue of the constitutionality of the Lawrenceville Subdivision Regulations. *Dougherty County*, 256 Ga. at 477-78, n.3, 350 S.E.2d at 460 n.3; *Moon v. Cobb County*, 256 Ga. 539, 350 S.E.2d 461 (1986). When the constitutionality of an ordinance is challenged, "the Superior Court determines the law and the fact from matters presented to it . . . ." *City of Atlanta v. Cates*, 260 Ga. 772, 773, 399 S.E.2d 474, 475 (1991).

This Court finds from the record established in the *de novo* trial that Plaintiff has met its burden of proof, showing by clear and convincing evidence that the applicable Subdivision Regulations of the City of Lawrenceville are unconstitutional and that Plaintiff has a clear, legal right to a Writ of Mandamus requiring the approval of its sketch plat submitted and rejected by Defendants on July 24, 1991. All further counts and requests for relief in Plaintiff's Application for Mandamus and Other Relief are hereby dismissed as moot.

The Court further holds that it was proper for the Court to transfer the record, evidence, and discovery from the March 22, 1991 trial in this Court, Civil Action File No. 90-A-07060-3, to the above-styled action and to consider the same as set forth in the Order of January 23, 1992. The parties in interest are virtually identical and no prejudice will result or has resulted to either party from consideration of the record and evidence in the prior proceedings. Further, to require Plaintiff to relitigate all issues litigated in Civil Action File No. 90-A-07060-3 would frustrate the interests of judicial economy. *Petkas v. Grizzard*, 252 Ga. 104, 312 S.E.2d 107 (1984). The law does not require a useless act and for this Court to ignore the prior submissions of the

sketch plat, both with and without the proposed Loop road shown, and the City's denial thereof would result in further impairment of Plaintiff's rights, further actions which would be futile, and further litigation of the issues pending before this Court. *See id.*

Notwithstanding Plaintiff's entitlement to a *de novo* trial on the constitutionality of the Subdivision Regulations and notwithstanding the transfer of the record from Civil Action File No. 90-A-07060-3, the outcome of this case would be the same considering only the facts and the record as established by the Mayor and City Council of the City of Lawrenceville on July 24, 1991. After a thorough and sifting review of the facts in the record developed before the Mayor and City Council, and after separating those facts from additional facts in the record established in the *de novo* trial, this Court finds and holds that Plaintiff has met its burden of proof and has shown by clear and convincing evidence that the provisions of the Subdivision Regulations of the City of Lawrenceville which require that any new street or thoroughfare shown on the Long-Range Road Classification Map of the Gwinnett County Comprehensive Plan or proposed by the State of Georgia to adjoin or traverse an owner's property be set forth, reserved, preserved and dedicated to the public without just and adequate compensation are unconstitutional, and that Plaintiff has a clear, legal right to a Writ of Mandamus requiring the approval of its sketch plat.

IT IS SO ORDERED, and Defendants are directed and ordered to approve Plaintiff's Sketch Plat within thirty (30) days of the date of this Order. This Court reserves jurisdiction over this case in order to assure that Defendants comply with the provisions hereof.

This 14th day of February, 1992.

/s/ Dawson Jackson
HONORABLE DAWSON JACKSON
Superior Court of
Gwinnett County

APPENDIX C

SUPREME COURT OF GEORGIA
ATLANTA

December 17, 1992

Case No. S92A0966

CITY OF LAWRENCEVILLE, GEORGIA, *et al.*

v.

GWINNETT 316 ASSOCIATES

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

All the Justices concur, except Hunstein, J., not participating.

SUPREME COURT OF THE STATE OF GEORGIA
Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court affixed the day and year last above written.

Sherie M. Welch, Clerk.

APPENDIX D

RELEVANT PORTIONS OF THE SUBDIVISION REGULATIONS OF LAWRENCEVILLE, GEORGIA 1986

ARTICLE I—GENERAL PROVISIONS

SECTION 1.4 POLICY: In the interest of orderly planned, efficient and economical development and furtherance of the general health, safety and welfare of the City and its citizens, it is hereby declared to be the policy of the City to consider the subdivision of land and its development to be subject to the control of the City and to ensure consistency with the Lane Use Plan.

Land to be subdivided shall be of such character that it can be used safely for building purposes without danger to health or peril from fire, flood, or other menace and that it can be serviced with those public facilities deemed necessary and appropriate for such development by the City of Lawrenceville.

The existing and proposed public improvements shall conform with and be properly related to the proposals shown in the land use plan and it is intended that these Regulations shall supplement and facilitate the enforcement of the provisions and standards contained in building and housing codes, the zoning ordinance, the land use plan, and capital budget and program of the City.

SECTION 1.5 PURPOSES:

These Regulations are adopted for the following purposes:

1. To encourage the development of an economically sound and stable community so as to help conserve and protect the natural, economic, and scenic resources of the City of Lawrenceville.

2. To assure the provision of required streets, utilities, and other facilities and services to both residential and non-residential subdivision developments.

3. To assure the adequate provisions of safe and convenient access and circulation, both vehicular and pedestrian and to help insure that all lots will be accessible to fire fighting equipment and other emergency and service vehicles.

4. To insure adequate drainage by providing for the proper layout of streets and lots, thereby reducing maintenance problems.

5. To promote a safe and healthy environment.

6. To assure adequate identification of property on the public roads.

7. To encourage and insure the compatible development of the community in accordance with the land use plan.

ARTICLE II—SCOPE OF REGULATIONS

SECTION 2.1 APPLICABILITY:

These Regulations shall apply as follows:

4. No land indicated as a public street shall be accepted, opened, or improved unless such street has received the legal status of a public street under prior existing regulations, or unless such street corresponds in its location and lines with a street shown on a plat approved by the Planning Commission and Mayor. No utilities or other facilities shall be installed on land dedicated as a public street unless such street has received the legal status of a public street under prior existing regulations or unless such street corresponds in its location and lines with a street shown on a plat approved by the Planning Commission and Mayor. However, the

City Council may locate and construct or may accept land dedicated for use as a public street provided that the ordinance or other measure seeking such approval is first submitted to the Planning Commission for review and comment.

6. No building permit shall be issued for, and no building or other structure shall be erected on any lot within the City, unless such lot has access to a street which shall have been accepted or opened as, otherwise shall have received the status of, a public street, or which corresponds in its location and lines with a street shown on a plat made and adopted by the Planning Commission and Mayor.

ARTICLE IV—SUBDIVISION APPLICATION PROCEDURE AND APPROVAL PROCESS

SECTION 4.1 GENERAL PROCEDURE: Whenever any subdivision of land is proposed, and prior to issuing any permit for erection of a structure in such proposed subdivision, the owner, subdivider, or authorized agent shall apply for, and secure approval of such proposed subdivision in accordance with the following procdeure, which includes one (1) step for a minor subdivision and four (4) steps for a major subdivision:

2. Major Subdivision

   A. Sketch Plat—any proposed recreational facility, private, shall be shown

   B. Preliminary Plat

   C. Construction Plans

   D. Final Plat

All submittals shall be consistent with provisions of the Zoning Ordinance and other code, ordinances and regulations of the City.

SECTION 4.2 SUBDIVISION REVIEW PROCEDURE:

2. Major Subdivisions

   A. Twelve (12) copies of the Sketch Plat shall be submitted to the Planning, Zoning and Inspection Department no later than fifteen (15) days prior to the date of the Planning Commission meeting at which it is to be reviewed. Appropriate review fees are to be paid by the subdivider at the time of submittal. Any proposed recreational facility, private, shall be shown.

   B. The Subdivider and his/her professional representative shall meet with the City Planner and City Engineer to review the Sketch Plat. This meeting shall occur at the beginning of the fifteen (15) day period or sooner to facilitate Sketch Plat review and modifications, if necessary. The Planning Commission shall review the Sketch Plat at its regularly scheduled meeting date.

   C. When the Sketch Plat has been approved by the City Planner and City Engineer and Planning Commisison, the City Council shall conduct its review at the regularly scheduled meeting date.

   D. Once the Sketch Plat is approved by the City Council the subdivider shall begin preparation of a Preliminary Plat.

   E. No later than fifteen (15) days prior to the meeting date of the Planning Commission the subdivider shall submit eight (8) copies of the Preliminary Plat to Planning, Zoning and Inspection Department for review, local distribution, and appropriate fees are to be paid.

   F. The subdivider shall also deliver one (1) copy of the Preliminary Plat to the following Gwin-

nett County departments for review and approval:

1. Water Department
2. Health Department (if subdivision is served by septic tank systems)
3. Water Pollution Control Department (if subdivision is to be served by a community sewer system)
4. Fire Department
5. Engineering Department (for drainage review)
6. Soil Conservation Service (USDA) (for additional erosion control measures)

G. The City Planner and City Engineer shall utilize the fifteen (15) day period prior to the Planning Commission meeting date to review the Preliminary Plat. The subdivider shall be notified if any changes are necessary to achieve compliance with these Regulations and shall be responsible for having all changes made and eight (8) copies of a revised plat submitted prior to the Planning Commission meeting date. The subdivider shall also bring evidence of approval of those county departments listed in Paragraph F above to the Planning Commisison meeting.

H. At the meeting, the Planning Commission shall approve, subject to modifications, table, or disapprove the Preliminary Plat. If approval is given subject to modifications, the required modifications, shall be provided to the subdivider in writing, and all modifications shall be made and approved by the City Planner and City Engineer prior to issuance of a grading permit. If the Preliminary Plat is disapproved, the

Planning Commission shall notify the subdivider in writing, citing the reasons for disapproval. The action of the Planning Commission shall be noted on the original of the Preliminary Plat, which shall be returned to the subdivider.

I. Preliminary Plat approval is tentative, pending submission of a Final Plat and is valid for a period not to exceed twelve (12) months, after which it shall expire. The Mayor of the City shall approve the plat subsequent to all other approvals.

J. A grading permit shall be issued subsequent to Preliminary Plat approval. Grading permit requires fee payment upon application. The Director of Planning shall issue grading permits.

K. Two (2) copies of Construction Plans depicting the design of all required improvments shall be submitted after, or as a part of Preliminary Plat approval to the Planning, Zoning and Inspections Department for review by the City Engineer prior to installation of any improvements. All review fees shall be paid at this time.

L. Upon securing approval of Construction Plans the subdivider may proceed with the installation of required improvements.

M. Within twelve (12) months from the date of Preliminary Plat approval, three (3) copies of a Final Plat for one or more phases of the subdivision shall be submitted to the Planning and Zoning Department at least fifteen (15) days prior to the date of the meeting of the Planning Commission and all appropriate fees paid. The subdivider shall also provide satisfactory evidence of improvements installation or provide the necessary improvements guarantee.

Failure to submit within this time period shall void the plan unless an extension for a period not to exceed six (6) months is granted by the Planning Commission. Said extension must be applied for in writing by the subdivider. If a plat is voided, in order for the subdivision process to continue, a new sketch plat must be submitted.

N. At the meeting, the Planning Commission shall determine whether all requirements of these regulations have been met and either approve, table, or disapprove the Final Plat. If the Final Plat is disapproved, the Planning Commission shall notify the subdivider in writing, citing the reason for disapproval. If the Final Plat is approved, the Mayor of the City shall sign the plat subsequent to staff approval.

O. When all improvements required by these Regulations have been made, the subdivider shall provide to the City Engineer one (1) complete set of as-built drawings depicting the subdivision and *all* improvements. A letter from the subdivider's registered professional engineer shall accompany this submittal and certify that all improvements have been installed in substantial accordance with the construction plans previously submitted to, and approved by the City Engineer, except for listed deviations.

P. The approved Final Plat is to be recorded in the office of the Clerk of Superior Court within sixty (60) days of the date of Final Plat approval.

Q. After Final Plat approval, lots may be sold, and building permits issued.

SECTION 4.3 DOCUMENTS SUBMITTAL SCHEDULE: In order to process subdivision applications, the following schedule shall be adhered to:

2. Major Subdivision

A. *Sketch Plat*—By advance appointment with the City Planner and City Engineer and at least fifteen (15) days prior to the Planning Commission meeting at which time the Sketch Plat will be reviewed. The location of any proposed recreation facility, private shall be shown on the Sketch Plat. The Sketch Plat will also be reviewed at the next regularly scheduled City Council Meeting following the Planning Commission Meeting.

B. *Preliminary Plat*—Fifteen (15) days prior to the date of the Planning Commission meeting at which the plat shall be reviewed. (B) Preliminary Plat and (C) Construction Plans may be combined.

C. *Construction Plans*—Within twelve (12) months subsequent to Preliminary Plat approval, but prior to installation of any required improvements.

D. *Final Plat*—Fifteen (15) days prior to the date of the Planning Commission meeting at which the Final Plat shall be reviewed but not later than twelve (12) months from the date of Preliminary Plat approval.

ARTICLE V—SPECIFICATIONS FOR DOCUMENTS TO BE SUBMITTED

SECTION 5.1 SKETCH PLAT: The Sketch Plat shall represent the entire area which the subdivider contemplates developing, including those units/sections not scheduled for immediate development. The Sketch Plat shall clearly indicate the proposed location of a recreational

facility, private. Eight (8) copies of the Sketch Plat shall be submitted to the Planning, Zoning and Inspections Department for review with the subdivider and his/her professional representative.

1. *Content*—The Sketch Plat submitted to the Planning, Zoning and Inspections Department may be prepared in ink or pencil on a reproducible medium and can be a freehand rendering. The Sketch Plat shall illustrate the ultimate development of the entire parcel(s) owned by the applicant and shall identify the sections(s) for which formal plat approval will initially be requested. It shall be prepared at a scale of not more than one inch equals 100 feet and is to include site topography at a contour interval of ten (10) feet or less. The Sketch Plat shall include at minimum the following information:

   I. Location of existing property lines, major easements/right of ways, water courses, drainage areas and ditches, and distinctive natural features.

   J. The location, names and width of all existing or proposed streets or public ways within; or directly adjacent to the subject property.

ARTICLE VII—REQUIREMENTS FOR IMPROVEMENTS, DESIGN AND CONSTRUCTION

SECTION 7.2 IMPROVEMENTS REQUIRED: The following improvements shall be installed by the subdivider in accordance with the design and construction standards contained herein. All such improvements shall be dedicated and conveyed or transferred to and the title shall vest in the City unless otherwise indicated on the recorded plat of subdivision.

All required improvements are to be installed or caused to be installed by the subdivider and the cost of installing

improvements other than water and sewer shall be included in the improvement guarantee to be furnished.

1. *STREETS*:

A. *General Requirements*: Subject to the provisions of these Regulations the following street improvements shall be installed and provided by the subdivider. The improvements shall be conveyed or transferred to, and title shall vest in, the City upon acceptance unless otherwise indicated on the plat.

3. *Topography and Arrangement*: At the completion of rough grading activities the subdivider's Engineer shall certify to the City Engineer that grading has been completed and conforms to the plans submitted, or submit "as-built" or "as-graded" profiles.

b. All streets shall be properly integrated with the existing and proposed system of thoroughfares and dedicated rights of way as established by the City.

h. All proposed subdivision shall normally have at least two (2) points of access, and provide for interconnection to similar adjacent uses. Proposed streets shall be extended to the boundary lines of the tract to be subdivided, unless prevented by topography or other physical conditions or unless in the opinion of the Planning Commission such extension is not necessary or desirable for the coordination of the layout of the subdivision with the existing layout of the most advantageous future development of adjacent tracts.

14. *Right-of-way*: Rights-of-way intended for streets, cross-walks, water mains, sanitary sewers, storm drains or any other use involv-

ing maintenance by a public agency shall be dedicated to public use by the preparer of the plat on which such right of way is established and shall be covered by any necessary easements. Easements must be provided for all sanitary sewer and water lines prior to their installation within, or outside a right of way.

APPENDIX E

BEFORE THE MAYOR AND CITY COUNCIL CITY OF LAWRENCEVILLE, GEORGIA

The sketch plat of Gwinnett 316 Associates came before the Mayor and Council for approval of Phase II of construction at the Gwinnett 316 Industrial Park. Mr. Alan Kunianski of Gwinnett 316 Associates and Mr. Carl Westmoreland, attorney for Gwinnett 316 Associates appeared at the hearing before Council on July 24, 1991 to present the drawing. The Mayor and Council, having heard argument, testimony and documentary evidence, now make the following findings of fact and conclusions of law in compliance with the March 27, 1991 Order of the Honorable Dawson Jackson, Gwinnett Superior Court:

FINDINGS OF FACT

Mr. Westmoreland presented the sketch plat for Gwinnett 316 Associates (Plaintiffs' 23). He admitted that the sketch does not show the Lawrenceville Loop Road as required by the City's subdivision regulations and ordinances.[1] He argued that the dedication requirements

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[1] The City's subdivision regulations set forth the procedure which an applicant must follow when seeking approval of a sketch plat.

Article I, Section 1.4 and 1.5 set forth the purposes of our subdivision regulations. These purposes include provision for orderly, planned, efficient and economical development in furtherance of the health, safety and welfare of our citizens and assurnace of safe and convenient traffic circulation for regular and emergency vehicles.

Article IV, Section 4.1(2), 4.2 and 4.3 list the procedure for developing major subdivisions.

Article V, Section 5.1 sets forth the required contents of a sketch plat. Section 5.1(1)(I) requires the sketch plat to show right of ways. Subsection 5.1(1)(J) sets forth the requirements that the developer show streets.

Article VII, Section 7.2 sets forth the improvements which subdividers must install. Subsection 7.2(2)(A)(3)(b) and (h) require

of the City's subdivision regulations amounted to an unconstitutional taking of the property of the applicant and that the applicant was not willing to amend its plat to show the road. (T-15, 16).

We also heard testimony from Bradford P. Leonard, Director of Planning and Zoning for the City of Lawrenceville. Mr. Leonard testified that the subdivision regulations and ordinances of the City of Lawrenceville require that a developer show future major arterials on its sketch plat if the road appears on the City's Long Range Road Classification Map. (T-19) Nothing in the City's ordinances require the developer to dedicate or donate any portion of the right of way at this point of the application process.

Bill Powell, Assistant Director of the Gwinnett County Transportation Department, also appeared before the Council. The evidence he presented proved that the Loop is partially constructed now, with several developers in the County having donated rights of way. (T-22-23) The evidence showed how the Loop was designed to encircle Lawrenceville, passing through the applicant's property beginning at an interchange to be built at State Highway 316 and ending at the intersection of Old Norcross and Monfort Roads. (T-24-26) The evidence showed that the interchange at State Highway 316 was designed to provide access at a location between Atkinson Road and Pike Street (a/k/a Georgia Highway 120) so as to relieve traffic congestion at these interchanges on State Highway 316. (T-22) The tie in at Old Norcross Road is fixed because the Loop must connect with Monfort Road to com-

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the integration of proposed streets and thoroughfares. Subsection 7.2(2)(B) sets forth the design standards for streets.

In addition to the subdivision regulations, the City adopted the Gwinnett County Long Range Road Classification Map by Resolution on March 7, 1988. This Resolution, as amended, requires that an applicant show major arterials and public thoroughfares which appear on the Long Range Road Classification Map, on its initial sketch plat.

ply with state requirements that the Loop be linked with the Duluth By-Pass (T-23, 25)

Powell's testimony further established that the Loop would occupy approximately 18.5 acres of the applicant's land. (T-27) Powell noted that other projects in the County had been completed with developer participation, with developers donating rights of way, and some even constructing roadways, in compliance with City and County subdivision regulations. (T-28)

Powell established that funding for the road is in the next County capital improvement projects by means of a four year extension of the one cent sales tax. (T-30) If the sales tax does not pass, funding for the Loop could come through the County's general fund. (T-39, 40)

Powell's testimony showed that traffic on Pike Street is currently almost at capacity. (T-22, 40) Traffic on Old Norcross Road continues to increase. The purpose of the Loop is to alleviate traffic congestion at these points and at the intersections of Atkinson Road and State Highway 316 and Pike Street and Highway 316, which are also at or near capacity at peak hours now. (T-43)

Powell warned that further saturation of Pike Street would impede access to the Gwinnett Medical Center, (T-42) jeopardizing the lives of citizens whose access to that facility may be critical.

The Loop, once constructed, will function as the applicant's internal road system; thus, the applicant will be relieved of the burden to build some internal access roads on its property. (T-43, 44) The right of way and construction costs of the applicant's internal roads will disappear. For this reason, showing the Loop on the sketch plat would not require the applicant to divest itself of additional right of way, but merely to put it's roadways in a different place. (City Exhibit 2).

The testimony of Gary Cornell, Director of the Planning Division for Gwinnett County, showed that Gwinnett has

been the fastest growing county in the United States. (T-50) The population of the County doubled from 160,000 in 1980 to 350,000 in 1990. (T-50) The economic impact of this growth is even more staggering. The County's employment base tripled from 50,000 jobs in 1980 to 150,000 jobs in 1990. (T-51) Dealing with such phenomenal growth has been the most difficult task of local governments in this county.

In an effort to plan for and accommodate this staggering growth, in 1987 Gwinnett County made a subarea study of the fastest growing portion of the County, known as the "Interstate 85-Highway 316 Corridor". (T-48) This area stretches from Pleasant Hill Road on I-85 in the south up to Lawrenceville-Suwanee Road in the north and across from the Chattahoochee River in the west to Highway 29 in the east. (T-51) The property of the applicant depicted on the sketch plat is a part of this corridor. According to this subarea study, landowners and developers planned for 60 million square feet of commercial and industrial development in the area. (T-52) Of these 60 million square feet, the applicant has proposed to develop 5 million square feet. (T-52)

To plan for traffic caused by such growth and to meet the needs it would create, the County undertook a traffic study of the area. This study indicated that the growth in this area would generate approximately 1 million additional vehicles trips per day along State Highway 316. (T-52)

Local governments simply cannot afford to raise taxes high enough to pay for a multi-billion dollar road system to accommodate the traffic which will be created by this amount of development. Cooperation and participation in the building process between developers and local governments is essential. Cornell showed that the purpose of the Long Range Road Classification Map was to foster such cooperation between local governments and develop-

ers to provide for cost efficient road construction in the future. (T-53) Cornell explained the process by which many roads in Gwinnett County have been built with the understanding that safe, economical, efficient and sufficient road systems are necessary for continuing growth development and safety in the County. (T-54-57) In fact, part of the Lawrenceville Loop Road has already been constructed under such a system of mutual cooperation between local authorities and private developers. (T-28) Historically, developers have recognized that if the road system is insufficient, growth and economic opportunity will move elsewhere. (T-54-55)

The Long Range Road Classification Map was designed to help the local governments and developers work together to determine how to create a road system which would be adequate to accommodate development and feasible for the City and County. Most developers recognize the benefit of the plan both for themselves and for the citizens of the City and County. Most developers also recognize that one hold-out could shut down the entire system, forcing the County to resort to condemnation to purchase the land at exorbitant rates. (T-56) Cooperation between developers and the local governing authorities resulted in the construction of several roads in the County and City such as the Gwinnett Drive extension, the Satellite Boulevard extension, Steve Reynolds Boulevard, Horizon Drive and Brookhollow Parkway. (T-28)

With respect to the applicant, the aforementioned negotiation process began on March 25, 1987 when County planners met with the developer to discuss the Lawrenceville Loop Road. (T-57) The developer built only two buildings initially, neither of which jeopardized the rights of way for the Loop Road. (T-57)

As negotiations between several developers and County officials continued in the late 1980's the Georgia Department of Transportation made an interchange justification study which demonstrated the need for the Lawrenceville

Loop Road. (T-58) According to that study, the Corporate Lakes Development, a 4 million square foot park north of State Highway 316, would generate approximately 5,400 vehicle trips in only one hour. (T-60) By the applicant's own admission its development would generate approximately 18,000 vehicle trips per day by 2000. (T-61) In 1989, the applicant generated approximately 1,800 vehicle trips per day. (T-61) Cornell testified that the 18,000 vehicle trips per day figure set forth by the applicant was very low based on comparable parks in the County (T-63) The evidence also showed that if the developer changes its design from strictly industrial to mixed industrial and office buildings, the number of vehicle trips per day would increase dramatically. (T-63-64)

In April of 1989, another County interchange study revealed that 36,000 vehicles per day would use the Loop interchange of the Loop and State Highway 316 at the applicant's property. (T-62) The applicant estimated that nearly one-half of these vehicle trips would originate from its park. (T-63, Defendant's 4) If there were to be no interchange at this site, all these vehicles would have to travel to the applicant's park or to Lawrenceville via Atkinson Road from State Highway 316 or Pike Street from Highway 316, making already crowded intersections impassable. If the Loop is not built, one-half to two-thirds of the traffic from the applicant's park would go to State Highway 316 via Atkinson Road or Pike Street. (T-64) Based on existing traffic flows, future traffic simply cannot be accommodated on Pike Street and Atkinson Road.

One principal beneficiary of the Loop will be the applicant. The construction of the Loop will bring the applicant and its tenants easy access to State Highway 316, Interstate 85 and beyond. Without the Loop, the developer would be an intolerable burden on the citizens of Lawrenceville. Its traffic would continue to pour onto to Pike Street and Atkinson Roads, which are already

near saturation at peak hours. Without the Loop, developers like the applicant will not be able to build simply because there would be no place for their traffic to go.

Pete Barnett, Appraisal Manager for Moreland, Altobelli Associates, Inc. testified about the impact the Loop would have on the applicant's property value. The Loop passing through the applicant's property would create three separate parcels of land. (T-68) Two of these tracts would become pin corner sites when the Loop interchange is complete at State Highway 316. (T-68) At this interchange, one acre tracts could be sold for fast food, gas or convenience store operations. The value of these tracts are calculated to $400,000 per acre. Comparable one acre sites were recently sold on Horizon Drive, north of the City, for $600,000 and $560,000 per acre respectively. (T-70) At the southern end of the property, a similar site at the Loop, Old Norcross and Monfort Road interchange was valued at $210,000 an acre. (T-70, 71)

Appraisal revealed that the applicant's 25 acre tract was worth $1.9 million dollars without the road and $4.1 million dollars with the road. (T-71) Thus, as a result of the installation of the Loop, the applicant would see its property value increased by $2.6 million dollars.

While the developer stands to enhance the value of its property substantially, the citizens of Lawrenceville continue to be burdened with ever growing traffic problems. A majority of these traffic problems arise on streets used by the developer's vehicles.

The Lawrenceville Police Department showed that a large concentration of accidents within the city limits occur on Pike Street where the trucks from the developer's property travel to State Highway 316. (T-72, City 6) The studies of the City's DUI Task Force reveal that 15% to 20% of the accidents in the City occur on Pike Street. These accidents are steadily rising. (T-73)

The evidence also showed that a tractor trailer truck cannot stay in one lane on Pike Street when it turns onto Old Norcross Road. (T-75) There simply is not enough room for current truck traffic now. There certainly will not be adequate room for trucks to travel safely when the applicant is generating 18,000 vehicle trips per day.

CONCLUSIONS OF LAW

We understand the applicant's constitutional arguments, (T-4-5), and we stress from the outset that nothing in the City's subdivision regulations constitute a taking of the applicant's property. At this stage of development, the applicant need only show the Lawrenceville Loop road, a major arterial, on its sketch plat. The City is not asking the applicant to dedicate or donate right of way at this point.

We understand that Georgia law provides that an individual has certain rights to the use of his own property. However, where that right confronts the police power exercised by local government in zoning, the law allows the zoning regulation to stand when it bears a substantial relation to the public health, safety, morality or general welfare. *Barrett v. Hamby*, 235 Ga. 262, 219 S.E.2d 399 (1975). We understand that *Barrett* announced a balancing test which requires that if the zoning regulations results in relatively little gain or benefit to the public while inflicting serious injury or loss on the landowner, such a zoning regulation is confiscatory and void. *Id.* The evidence before us reveals that the balance in this matter is exactly opposite of that which arose in *Barrett v. Hamby.*

In this case, there is substantial injury and burden placed on the citizens of the community in that traffic will continue to increase if there is no outlet for it. On the other hand, there is great benefit to the developer, as the value of its property will increase approximately $2.6 million dollars. Moreover, further development of

this property without accommodation for the Loop road will pose a serious threat to the safety and welfare of this community. The evidence before us showed how the intersections of Pike Street and State Highway 316 and Atkinson Road and State Highway 316 are at or near capacity at peak hours already. Adding more vehicles would make a bad situation much worse.

We also understand that conditional zoning is valid in Georgia. *Ervin County v. Brown*, 228 Ga. 14, 183 S.E.2d 743 (1971). The situation before us is quite similar to conditional zoning in that approval of the sketch plat is conditioned on the developer showing the Lawrenceville Loop Road, a major arterial on the City's and County's Long Range Road Classification Map. Local governments may impose conditions on development pursuant to the police power for the protection or benefit of the community. *Cross v. Hall County*, 238 Ga. 709, 235 S.E.2d 379 (1977); *Johnson v. Glenn*, 246 Ga. 685, 273 S.E.2d 1 (1980). Under Georgia law, the condition that the applicant in this case show the Lawrenceville Loop Road on its sketch plat is a valid condition of development.

We also understand that the United States Supreme Court has placed restrictions on local governments in this area. We understand that a land use regulation, such as our requirement that a developer show major arterials on its sketch plat, does not effect a taking if it substantially advances legitimate governmental interests and does not deny a owner economically viable use of his land. *Nollan v. California Coastal Commission*, 483 U.S. 825, 97 L.Ed.2d 677, 107 S.C. 3141 (1987); *Agins v. Tiburon*, 447 U.S. 255 at 260, 65 L.Ed.2d 106, 100 S.C. 2138 (1980).

In this case, we are first presented with the question whether the requirements of our subdivision regulations and ordinances advance a valid public purpose. We are convinced that they do. The purpose of requiring a de-

veloper to show major arterials on the Long Range Road Classification Map in its sketch is to insure that the growth that this developer brings to the City will be adequately provided for. In the matter before us today, there is an undeniable connection between our action on the sketch plat before us and the purpose underlying our subdivision regulations and ordinances requiring the developer to show the right of way.

The evidence before us established that this development already throws car and heavy truck traffic onto Old Norcross Road, Pike Street and Atkinson Road. (T-42, 63, 64, 65) The evidence showed that the interchanges of Pike Street and Atkinson Road at State Highway 316 are already at or near capacity at peak hours. (T-22, 40) The evidence showed that trucks turning on Pike Street and Old Norcross Road do not have enough room to enter and exit that intersection under existing conditions. (T-75) By the applicant's own estimate traffic generated by their development will increase from approximately 1,800 vehicles trips per day in 1989 to 12,000 vehicle trips per day in 1995 and nearly 18,000 vehicle trips per day in 2000. (T-61-63, Defendant's Exhibit 4)

Without the Loop, all these vehicles must travel to and from this development via Atkinson Road, Old Norcross Road and Pike Street, and the existing traffic problems will take on nightmarish proportions as development continues.

CONCLUSION

We recognize, along with counsel for the applicant, that developers rarely do things for altruistic reasons. (T-83) That is why we owe a duty to the citizens of Lawrenceville to plan for safe and efficient growth and to balance the needs of the entire community and the desires of developers.

When a developer stands to have his property value increased and see his business expanded by the construc-

tion of a public thoroughfare, it is only fair for him to bear a part of the development costs which will result in his prosperity. It is patently unfair to throw the burden of development on local taxpayers when developers stand to reap a windfall once that development has been completed.

The Georgia General Assembly has recognized this fact of modern life and provided for the assessment of impact fees to force developers to pay their fair share of the costs of growth. O.C.G.A. § 36-71-1 et seq. Our subdivision regulations and ordinances are a forerunner to the imposition of impact fees.

If we were to allow the developer to go forward without showing the Loop, it would erect buildings across the proposed right of way required by the Long Range Road Classification Map. Traffic would continue to increase. When the County eventually condemned the property, acquisition would come at an astronomical cost to the taxpayers of Gwinnett County.

We stress, once again, that at this stage of the application process, our subdivision regulations and ordinances do not require the application to dedicate any right of way. Our only requirement is that it *show* the Lawrenceville Loop on its sketch plat, consistent with the City's and County's Long Range Road Classification Map. The applicant's sketch plat does not show the Lawrenceville Loop Road as required under of our subdivision regulations and our resolution of March 7, 1988, as amended.[2] For all the foregoing reasons, we hereby deny the sketch plat submitted by the applicant.

---

[2] The City's subdivision regulations set forth the procedure which an applicant must follow when seeking approval of a sketch plat.

Article I, Section 1.4 and 1.5 set forth the purposes of our subdivision regulations. These purposes include provision for orderly, planned, efficient and economical development in furtherance of the

CITY OF LAWRENCEVILLE

By: /s/ Bartow Jenkins
BARTOW JENKINS, Mayor

/s/ Mahlon Burson
MAHLON BURSON

/s/ Ray Oakes
RAY OAKES

/s/ James F. Brand
JAMES F. BRAND

/s/ G. Michael Crow
G. MICHAEL CROW

ATTEST:

/s/ Robert B. Baroni
ROBERT B. BARONI, City Clerk

[SEAL]

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health, safety and welfare of our citizens and assurance of safe and convenient traffic circulation for reglar and emergency vehicles.

Article IV, Section 4.1(2), 4.2 and 4.3 list the procedures for developing major subdivisions.

Article V, Section 5.1 sets forth the required contents of a sketch plat. Section 5.1(1)(I) requires the sketch plat to show right of ways. Subsection 5.1(1)(J) sets forth the requirements that the developer show streets.

Article VII, Section 7.2 sets forth the improvements which subdividers must install. Subsection 7.2(2)(A)(3)(b) and (h) require the integration of proposed streets and thoroughfares. Subsection 7.2(2)(B) sets forth the design standards for streets.

In addition to the subdivision regulations, the City adopted the Gwinnett County Long Range Road Classification Map by Resolution on March 7, 1988. This Resolution, as amended, requires that an applicant show major arterials and public thoroughfares which appear on the Long Range Road Classification Map, on its initial sketch plat.

Supreme Court, U.S.
FILED
APR 20 1993
OFFICE OF THE CLERK

No. 92-1506

In The

Supreme Court of the United States

October Term, 1992

CITY OF LAWRENCEVILLE, GEORGIA; BARTOW JENKINS, Mayor; SONNY BRAND, MAHLON BURSON, RAY OAKES, and G. MICHAEL CROW, SR., Members of the City Council for the City of Lawrenceville, Georgia; and BRADFORD P. LEONARD, Director, Planning, Zoning and Inspections,

Petitioners,

vs.

GWINNETT 316 ASSOCIATES, a Georgia General Partnership,

Respondent.

Response To Petition For Writ Of Certiorari To The Supreme Court Of The State Of Georgia

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioners omit facts in their statement of the Question Presented that are material to the finding of an unconstitutional taking by the state courts. A more accurate statement of the issue is as follows: Whether under the Takings Clauses contained in either the Constitution of the State of Georgia or the United States Constitution, a city may require a developer who has previously obtained city approval of its plan of development to deviate from its plan by requiring the reservation, dedication, and conveyance to the public, without compensation, of eighteen acres of right of way for a subsequently planned, unrelated, unfunded, unscheduled, high speed, limited access highway that would destroy the developer's use of over ninety acres of land in addition to eighteen acres of right of way land.

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No. 92-1506

In The

Supreme Court of the United States

October Term, 1992

CITY OF LAWRENCEVILLE, GEORGIA; BARTOW JENKINS, Mayor; SONNY BRAND, MAHLON BURSON, RAY OAKES, and G. MICHAEL CROW, SR., Members of the City Council for the City of Lawrenceville, Georgia; and BRADFORD P. LEONARD, Director, Planning, Zoning and Inspections,

Petitioners,

vs.

GWINNETT 316 ASSOCIATES, a Georgia General Partnership,

Respondent.

Response To Petition For Writ Of Certiorari To The Supreme Court Of The State Of Georgia

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Gwinnett 316 Associates, a Georgia General Partnership (hereinafter "Gwinnett 316"), respectfully submits its Response to the Petition for Writ of Certiorari of Petitioners City of Lawrenceville (hereinafter the "City"), Bartow Jenkins, Sonny Brand, Mahlon Burson, Ray

Oakes, G. Michael Crow, and Bradford P. Leonard (hereinafter all collectively referred to as "Petitioners").

ADDITIONAL CONSTITUTIONAL PROVISIONS INVOLVED

Petitioners omit to inform the Court that Gwinnett 316's constitutional challenges were primarily based on the Georgia Constitution's Takings Clause. Ga. Const. of 1983, art. I, § 3, ¶ 1. This paragraph provides that "private property shall not be taken or damaged for public purposes without just and adequate compensation being first paid." *Id.*

STATEMENT OF THE CASE

Statement of the Facts

Contrary to the overstatements in the Petition, the decisions in this case did not undermine the ability of local governments to plan future road systems. The facts as presented in the Petition are in varying respects inaccurate and incomplete versions of the facts as tried in the state courts and omit the core facts upon which the state courts' decisions were generated. (*See* Final Order and Judgment [hereinafter "Order"] at 1-6, Petition App. B at 2a-6a.) Indeed, most of the facts contained in the Petitioner's Statement of the Case are lifted from the self-serving, nonbinding findings of fact issued by the Petitioners after the trial court remanded the case to the City for reconsideration. (*See* Petition App. E.) Accordingly,

because Gwinnett 316 disputes all facts or the characterizations of the facts contained in Petitioners' Statement of the Case, it is necessary for Gwinnett 316, pursuant to this Court's Rules, to make its own, detailed Statement of the Case.

An account of the history of Gwinnett 316's development and the purpose of the proposed loop road (hereafter the "Loop Road") to alleviate general, growth-related traffic problems in Gwinnett County (hereafter the "County"), and the history of the application of the Subdivision Regulations by the City is necessary to evaluate the Petition's merits.

Gwinnett 316 owns 342 acres of property (hereinafter the "Property") in Gwinnett County, Georgia, which is in the Atlanta, Georgia metropolitan area. The Property was purchased in 1985 by Gwinnett 316 to create an industrial distribution warehouse development in a Heavy Manufacturing zoning district. (Transcript of the Proceedings in Civ. Act. File No. 90-A07060-3 [hereinafter "T1"] at 68; Transcript of the Proceedings of January 24, 1992 in Civ. Act. File No. 91A-5023-3 [hereinafter "T3"] at 57.) The City approved Gwinnett 316's sketch plat for development in 1985, and since then Gwinnett 316 has been building, leasing, and selling distribution warehousing and light manufacturing buildings on the Property. (T1. 69.) The buildings Gwinnett 316 specializes in constructing range, for the most part, between 100,000 and 400,000 square feet. (T1. 69.) Except for approved minor deviations, Gwinnett 316 has not deviated from its plat approved in 1985. (T1. 72-73.)

The Subdivision Regulations were adopted *after* Gwinnett 316 began to develop the Property and *after* approval of its sketch plat for development. The first version of the Subdivision Regulations was adopted in 1986. The Subdivision Regulations in current form require a developer who is seeking the right to develop its property and to locate buildings thereon to first submit and obtain approval of a sketch plat showing roads in the proposed subdivision. *See* Subdiv. Reg. §§ 2.1, 4.1, & 5.2, (Transcript of Civil Hearing in Civil Action File Number 91A-502303 [hereinafter "T2"] at 54-55, 63, & 69-71.) The procedure set forth in article IV of the Subdivision Regulations provides that no permit for construction in a proposed subdivision can be issued until an application to subdivide has been submitted and approved according to all requirements. (T2. 63-67.) Section 1.12 prohibits the issuance of a building permit if the proposed construction involves property subdivided in violation of the Subdivision Regulations. (T2. 53.)

The Subdivision Regulations further require all persons seeking development approval to reserve any and all proposed rights-of-way shown on the Gwinnett County Long Range Road Classification Map (hereinafter "Road Classification Map"), whether or not the roads relate to the needs of the development in any way and regardless of whether or not the proposed roads will ever be built. Also, *all* roads shown on the Road Classification Map must be dedicated to the public. *See* Subdiv. Reg., amend. of July 16, 1990, § III(a), (T2. 102); Subdiv. Reg.

§ 7.2.1.A.14, (T2. 86.).[1] Under any reading of the Subdivision Regulations, Gwinnett 316 can never build in any way either on the physical location of the proposed right of way for the Loop or in any manner which may conflict with the proposed right of way. The proposed Loop was placed on the Road Classification Map after the Subdivision Regulations were adopted and after the original development sketch plat was approved. (T3. 143-46.) Neither can Gwinnett 316 make any use of its surrounding land until the Loop Road is reserved on a sketch plat.[2]

The Subdivision Regulations are an uncommon example of the common practice by local governments of requiring specific road improvements as a condition of building permit approvals. Unlike the application of common road dedication requirements, however, these Subdivision Regulations were applied to require Gwinnett 316 to reserve and publicly dedicate a road that is not related to Gwinnett 316's development. The trial court rejected Petitioners' assertions that the Loop was somehow related to Gwinnett 316's development, finding as follows:

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[1] Article III(d) of the July 16, 1990 amendment to the Subdivision Regulations also contains the reservation requirement that any street shown on the Road Classification Map must be reserved and set out on the owner's development plans submitted for approval to the City.

[2] One version of the Subdivision Regulations in effect before the trial court remanded the case to the Mayor and City Council required Gwinnett 316 to *build* the Loop, (T2. 81; T3. 144-46 & 463), but after the trial court remanded the case to Petitioners for reconsideration, the Mayor and City Council rescinded this provision before the case returned to the trial court, (T2. 106.)

> The Lawrenceville Loop is unfunded and unscheduled for complete development and neither the City of Lawrenceville nor Gwinnett County have sufficient funds currently available for the purchase of the Loop right-of-way and construction of the road within Plaintiff's property. . . . The right-of-way for the Loop road constitutes approximately 18.5 acres of land, which bisects Phase II of the property, and Plaintiff has been denied the use of its property for more than two (2) years. The refusal to approve the submitted sketch plat has impacted more than 90 additional acres of Plaintiff's property by rendering it undevelopable as a result of the serpentine shape of the proposed Loop and its proposed location along a ridge line within Gwinnett 316. As a result of the location and elevation of the proposed Loop road and the topography of Gwinnett 316, truck traffic would not be able to safely access a substantial portion of the development. Additionally, the approved plan for the Loop road provides for four lanes and a median as the road traverses Plaintiff's property. There are no median cuts or access points from the Loop road to the Gwinnett 316 property on the plan for the Loop road which has been approved.

(Order at 5-6, Petition App. at 5a-6a.) The Loop Road as planned would cost Gwinnett 316 over eight million dollars ($8,000,000.00), making it disastrous for the development. (T1. 79 & 83; T3. 53-54, & 87.) The Loop Road's right of way effectively destroys Gwinnett 316's use of the right of way land plus ninety additional acres without providing road service to Gwinnett 316.

The real purpose for the Petitioners' imposition of the Loop Road conditions was found to be as follows: "The plan for the Lawrenceville Loop arose from the general increase in traffic in Gwinnett County and the City of Lawrenceville. The public need for the Loop was not created by the development of Gwinnett 316 for industrial warehouse development." (Order at 6, Petition App. at 6a.)

The notable mischaracterizations of the facts by Petitioners are further exemplified in the very first footnote in the Petition in which Petitioners allege that Gwinnett 316 "insisted" that the Loop Road be placed on the Road Classification Map. (Petition at 3 n.l.) Gwinnett 316 did initially attempt to work with Petitioners in arriving at a mutually agreeable plan for the Loop Road, but any alleged "enthusiasm" Gwinnett 316 may have exhibited towards the Loop occurred before Gwinnett 316 was informed that Petitioners expected Gwinnett 316 to donate its land and to build, without compensation, a high speed, limited access highway that would not service traffic created by Gwinnett 316 and that would destroy further development plans. When the City amended its Subdivision Regulations in 1989, the City's confiscatory purpose became clear. (T1. 70, 74, 104, 63-65, 107, 83, 85, & 116; T3. 51, 75, 81, 144-46, 383, & 384.)

Statement of the Course of the Proceedings

After several years of attempting to negotiate with Petitioners, Gwinnett 316 filed its first complaint in civil action file number 90-A-07060-3 on December 11, 1990. (R. 490-502.) Petitioners had rejected Gwinnett 316's first

sketch plat because it did not show the Loop Road's right of way, (T3. 82 & T1. 84), and had rejected a second sketch plat because the proposed Phase II development conflicted with the proposed Loop. (Gwinnett 316 had revised the first plat and had resubmitted it showing the Loop Road superimposed over the development.) (T1. 85.)

On March 27, 1991, the trial court remanded the case for Petitioners' reconsideration to clarify the reason for the denial. (R. 626-27.) Gwinnett 316 again resubmitted its sketch plat without the Loop Road. (*See* T3. 395). After the resubmitted sketch plat was rejected, (T3. 408 & 586-87; T1. 83), Gwinnett 316 then submitted a sketch plat showing the Loop Road superimposed on the development; this plat was also rejected, (T2. 82 & 589). This time the Mayor and City Council made findings of fact and conclusions of law as required by the trial court's Order of March 27, 1991 that revealed their reasons for denial of the sketch plat, and Gwinnett 316 renewed its suit and filed a second complaint, (R. 18-35.)[3]

After the trial court declared the Subdivision Regulations unconstitutional and issued a writ of mandamus,

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[3] Petitioners admitted the sketch plats were denied because an unencumbered right-of-way was not reserved exclusively for the public on the plats. But for the existence of the Loop Road on the County's Road Classification Map and the Subdivision Regulations, however, the development would have been approved. (*See, e.g.*, T3. 143-45 (testimony of Planning, Zoning and Inspections Director Bradford Leonard); *see also* T3. 52, 67, 87, 97-100; *compare* Petition at 5 (implying without foundation that Gwinnett 316's proposed roads on the plat were "hazardous")).

(R. 480-83), Petitioners applied for permission to appeal to the Georgia Supreme Court. The Georgia Supreme Court granted the application based on the arguments and representations about the record contained in the Petitioners' application. After considering the facts as shown in the actual record, the Georgia Supreme Court affirmed the order of the trial court in full and declined to issue an opinion.[4]

Petitioners did not ask the trial court or the Georgia Supreme Court for a stay of the grant of the writ of mandamus until after their belated request for reconsideration was denied. The trial court subsequently ordered Petitioners to grant Gwinnett 316 its requested permit under threat of contempt, and Petitioners complied.

SUMMARY OF THE ARGUMENT

This Court should reject the request for a writ of *certiorari* to the Georgia Supreme Court for three reasons. First, the decision of the trial court expressly stated that it based its holding that the Subdivision Regulations were unconstitutional on the Georgia Constitution, which provides greater protection than provided under the United States Constitution. Therefore, the adequate and independent state law grounds doctrine applies, and this Court

[4] The portrayal of the record in Petitioners' application for discretionary review to the Georgia Supreme Court was as incomplete and misleading as the present Petition.

thus does not have jurisdiction. Second, even if the Georgia Constitution does not independently support the state courts' decisions, Petitioners failed to present any reasons for why exceptional circumstances exist for this Court to review the factual findings essential to the determination of the constitutional issues involved, and hence there is no reason for this Court to undertake a factual appellate review. Third, because the Subdivision Regulations effect a regulatory taking of Gwinnett 316's property interests as well as a physical invasion of its property, the state courts appropriately determined the Subdivision Regulations were unconstitutional under the Fifth and Fourteenth Amendments. Gwinnett 316 has been denied further development of its Property for five years even though the evidence demonstrated that the impact of its development was completely unrelated to the Loop Road. With respect to eighteen acres of right of way that Gwinnett 316 must forever reserve as an easement for the public, a regulatory taking has occurred, and a physical invasion was attempted. Additionally, the application of the Subdivision Regulations effected a regulatory taking of Gwinnett 316's previously approved development rights with respect to ninety additional acres surrounding the right of way.

REASONS TO REJECT THE PETITION

I. THE STATE COURT DECISIONS EXPRESSLY REST ON ADEQUATE AND INDEPENDENT STATE LAW GROUNDS.

This Court should not assume jurisdiction over this case because the state courts' decisions adequately rest on independent state law grounds. Under circumstances in which a state court has clearly and expressly rested its decision upon independent state law grounds adequate to support its holding, the Supreme Court will not assume jurisdiction. *Michigan v. Long*, 463 U.S. 1032, 1041 (1983); *Fox Film Corp. v. Maller*, 296 U.S. 207, 210 (1935); *see generally Braxton v. United States*, 111 S. Ct. 1854, 1857 (1991) (a principal purpose for which the Supreme Court uses its narrow certiorari jurisdiction is to resolve conflicts in federal law existing among the federal circuit courts of appeal or state supreme courts). When the state court decision subjected to scrutiny has specifically stated that it is based on adequate and independent state law grounds, this Court will not review the holding to determine whether it was an accurate interpretation of the state law implicated. *Klinger v. Missouri*, 80 U.S. 257 (1871).

Jurisdiction for a writ of certiorari is lacking. The trial court expressly held as follows: "[T]he Constitution of the State of Georgia offers its citizens greater rights and more benefits than does the federal constitution. . . ." (Order at 7, Petition App. "B" at 7a.)[5] Accordingly,

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[5] *Cf. Grissom v. Gleason*, 418 S.E.2d 27, 29 n.1 (Ga. 1992) (overruling *Denton v. Con-Way Southern Express, Inc.*, 402 S.E.2d

because the trial court clearly stated its intention to rest its decision on the Takings Clause of the Georgia Constitution, the adequate and independent grounds doctrine applies. Notwithstanding the scope of the federal constitution, under Georgia cases interpreting the constitutional limits of local governments' planning powers, it is well established that when land use regulations take development rights without providing for the prior payment of compensation, the regulations are unconstitutional. *WMM Properties, Inc. v. Cobb County,* 339 S.E.2d 252, 255 (Ga. 1986); *see Lamar Advertising v. City of Albany,* 389 S.E.2d 1216 (Ga. 1990) (municipality could not take right to maintain pre-existing signs that were of a type in which the plaintiff specialized without compensating the plaintiff); *see also Inner Visions, Ltd. v. City of Smyrna,* 400 S.E.2d 915 (Ga. 1991) (owners were entitled to have business license issued under conditions in building code in existence at the time application was made).

In the instant case it is not disputed that Gwinnett 316 obtained approval of its plan to develop the Property in 1985, before the Subdivision Regulations were adopted and before the Road Classification Map showed the hypothetical Loop Road. Gwinnett 316 relied upon the 1985 approval in commencing to develop its Property for the

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269 (Ga. 1991), but noting that although the equal protection clause of the Georgia Constitution is coextensive with the equal protection provisions in the Fifth and Fourteenth Amendments, there are numerous examples where the floor rights guaranteed by the federal constitution have been supplemented by additional guarantees contained in the Georgia Constitution).

purpose in which it specialized. The Subdivision Regulations not only destroyed the ability to develop the Property as originally approved, but also required the donation of more than eighteen acres of land without any form of compensation. (T3. 52). Therefore, the Subdivision Regulations do not survive the scrutiny of the Georgia Constitution.

II. PETITIONERS HAVE FAILED TO INDICATE ANY REASON FOR THIS COURT TO OVERRULE THE FACTUAL FINDINGS OF THE STATE COURTS.

This Court should reject the Petition because the trial court's factual findings support a holding that the Subdivision Regulations are unconstitutional. Specifically, the trial court found: (1) that the Loop Road was not related to or meant to service traffic generated by Gwinnett 316; (2) that the Loop Road was the type of major highway intended to alleviate general traffic problems in the County and the City; (3) that the real reason the City adopted the Subdivision Regulations was because it could not afford to build needed roads given the lack of available public funds; and (4) that the Loop Road not only would not service Gwinnett 316's traffic needs, but also the Loop Road's design and characteristics would destroy Gwinnett 316's use of the eighteen acres of right of way occupied by the Loop Road and would destroy the ability to develop over ninety additional acres. (Order at 5-6, Petition App. "B" at 5a-6a).

Although the findings of the state courts are not binding to the extent they undercut federal constitutional guarantees, this Court "customarily accept[s] the factual

findings of state courts in the absence of 'exceptional circumstances.' " *California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc.* 445 U.S. 97, 111-12 (1980) (quoting *Lloyd A. Fry Roofing Co. v. Wood,*, 344 U.S. 157, 160 (1952)). "Moreover, 'an issue does not lose its factual character merely because its resolution is dispositive of the ultimate constitutional questions.' " *Hernandez v. New York,* 111 S. Ct. 1859, 1870 (1991). Before Petitioners can attack the state courts' constitutional analysis, they must demonstrate that the facts dispositive of this case should be reviewed and reversed by this Court.

There are no "exceptional circumstances" justifying the rejection of the state courts' factual findings. *California Retail Liquor Dealers Ass'n.*, 445 U.S. at 111-12. Petitioners have not even argued that the trial court erred in making its factual findings given the testimony before it. Indeed, the facts considered by the state courts in analyzing the case under the decision in *Nollan v. California Coastal Commission,* 483 U.S. 825, 837 (1987), established that traffic generated by Gwinnett 316's development would be wholly unrelated to the conditions imposed on Gwinnett 316 by the Subdivision Regulations. (Order at 7, Petition App. "B" at 7a.) For example, a traffic expert testified for Gwinnett 316 that existing roadways can be improved in the area with minor improvements to adequately serve Gwinnett 316's current and proposed development; that Gwinnett 316's development only generates 3% of the traffic volume on surrounding roads; that even with the future complete build-out of the development, Gwinnett 316 will not overtax surrounding roads; that

traffic using the development would not use Georgia State Highway 316, which Petitioners claim would become accessible, (Petition at 6); and that Gwinnett 316 does not use the surrounding roads when the roads experience their greatest strain from residential commuter, rush-hour traffic. (T1. 129-31 & 146-47.) Remarkably, the only testimony before the trial court supporting Petitioners' arguments came from a single witness – a policeman who was not a trained traffic engineer and who did not conduct any study of the traffic volumes to and from the development. (T3. 132.) Petitioners' disagreement with the trial court's rejection of the facts as Petitioners asserted them to be does not constitute exceptional circumstances.

III. THE STATE COURTS DID NOT ERR IN HOLDING THAT PETITIONERS HAD TAKEN GWINNETT 316'S PROPERTY WITHOUT JUST COMPENSATION IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

Petitioners cannot establish special or important reasons for granting the Petition as required under United States Supreme Court Rule 10.1. For example, Petitioners have failed to show that the Georgia Supreme Court "has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals." U.S. Sup. Ct. R. 10.1(b). Neither does the Petition demonstrate that the decisions of the Georgia courts in this case have "decided an important question of federal law which has not been, but should be, settled by this Court," or that the state courts have

"decided a federal question in a way that conflicts with the applicable decisions of this Court." U.S. Sup. Ct. R. 10.1(c).

There is no inconsistency in the application and understanding of what is an unconstitutional exaction of a property interest from a landowner wishing to acquire a development permit. The Supreme Court in *Nollan v. California Coastal Commission* cited more than twenty cases from various jurisdictions following the same analysis as followed by the state courts in this case and indicated that the constitutional boundaries for permissible government exactions are relatively clear. 483 U.S. 825, 839-40 (1987).

Given the relatively clear lines between a constitutional versus an unconstitutional exaction imposed on developers, there is no need to grant a writ of *certiorari*. Gwinnett 316 should not be singled out to bear the majority of the burden for improving the Loop Road to offset the increase in traffic occurring in the City. "One of the principal purposes of the Takings Clause is to 'bar Government from forcing some people alone to bear public burdens which, in all fairness and justice should be borne by the public as a whole.' " *Nollan*, 483 U.S. at 835 n.4 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). This case is thus a straight-forward takings case. There is no question that under the federal constitution "a State, by *ipse dixit*, may not transform private property into public property without compensation, even for [a] limited duration. . . . This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980).

An examination of this Court's takings jurisprudence further supports the rejection of the Petition. This Court has classified challenges to the exercise of governmental authority brought under the Fifth Amendment into two categories: (1) those cases in which the regulation denies all economically beneficial or productive use of the land and (2) those cases in which the physical invasion of the landowner's property interest has occurred. *Yee v. City of Escondido, California*, 112 S. Ct. 1522, 1526 (1992) (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982), and *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 125-28 (1978)). Gwinnett 316 argued to the state courts that Gwinnett 316's property interests in the eighteen acre right of way occupied by the Loop Road through the Property and in Gwinnett 316's ninety acres surrounding the right of way had separately been taken under either of the two categories. Regardless of which of the two analyses is applied to the facts of this case, the City's Subdivision Regulations take Gwinnett 316's land without compensation and in violation of the federal constitution.

A. The City's Subdivision Regulations Caused a Regulatory Taking of Gwinnett 316's Property Interests.

Petitioners have attacked the decisions of the state courts on the grounds that they allegedly failed to correctly apply the proposition that a land use regulation does not amount to a regulatory taking if it substantially advances a legitimate state interest and does not deny an owner economically viable use of his land. (Petition at 10 (citing *Penn Central Transp. Realty Co.*, 438 U.S. at 127, and

Village of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365 (1926)). The state courts, however, correctly analyzed this case under a regulatory takings framework.

1. The Subdivision Regulations did not substantially advance a legitimate state interest.

In *Nollan*, the Court analyzed whether the condition imposed "substantially advanced" a state interest under the Takings Clause of the Fifth and Fourteenth Amendments. 483 U.S. at 835; (*see* Order at 7, Petition App. B at 7a). The state courts correctly applied *Nollan* to the extent its facts are analogous in some respects to the facts of the instant case.

In *Nollan*, the land at issue was a beachfront lot located between a public park and beach to the north and another public beach to the south. On the lot sat a bungalow in a state of disrepair that the Nollans desired to replace. According to California law, the Nollans were required to obtain a permit to build on their property, and they submitted an application for approval to replace the existing bungalow. The governmental authority responsible for reviewing applications for development of beachfront property conditioned the grant of the Nollans' building permit upon the dedication of an easement to the public to pass across the property. *Nollan*, 483 U.S. at 827-29.

The circumstances in the instant case favor a finding of a taking of the eighteen acre right of way even more so than the circumstances at issue did in *Nollan*. This Court

in *Nollan* began its discussion with the following observation:

> Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, rather than conditioning their permit to rebuild their house on their agreeing to do so, we have no doubt there would have been a taking. To say that the appropriation of a public easement across a landowner's premises does not constitute the taking of a property interest but rather . . . "a mere restriction on its use," . . . is to use words in a manner that deprives them of all their ordinary meaning.

483 U.S. at 831. In the instant case, the Subdivision Regulations prohibit *all* building in the certain area of right of way shown on the Road Classification Map and hence impose an absolute, *per se* development restriction on eighteen acres of Gwinnett 316's land regardless of Gwinnett 316's proposed use of its surrounding land. Because a forced reservation of the Loop right of way has been imposed on Gwinnett 316, the right of way has been taken.

Assuming, *arguendo*, that a taking did not occur by reason of the forced reservation of the eighteen acres for public use, a taking of the surrounding land was still properly found based on the imposition of the condition of development of the surrounding acreage. Gwinnett 316 argued to the state courts that conditioning future development of the land surrounding the Loop right of way on the depiction of the right of way on Gwinnett 316's sketch plat was unconstitutional because the condition imposed

did not substantially advance a legitimate state interest. The Petitioners allege without basis that the City could have prohibited all development in the area of Gwinnett 316 in order to alleviate alleged public traffic and safety concerns allegedly caused by Gwinnett 316, and therefore they could require Gwinnett 316 to show the Loop Road right of way on the sketch plat as an alternative to prohibiting all development. Although the Court in *Nollan* noted that "[i]f a prohibition designed to accomplish that purpose would be a legitimate exercise of the police power rather than a taking, it would be strange to conclude that providing the owner an alternative to that prohibition which *accomplishes the same purpose* is not," the Subdivision Regulations do not accomplish a purpose that could be legitimately furthered by prohibiting development of the Property. 483 U.S. at 836-37 (emphasis supplied).

The state courts did not err in finding that the facts needed to meet the nexus required in *Nollan* were not present. The alleged alternative to totally restricting development – reserving the Loop Road on the sketch plat – was not imposed by Petitioners to serve the same purpose as a prohibition on Gwinnett 316's development. Rather, the purpose sought by the imposition of the sketch plat condition was to obtain a road designed primarily to service and alleviate traffic problems caused by the general explosion of commuter traffic in and around the City and County as a whole.

The decision in *Nollan* refuted the rationale advanced by Petitioners. The following statement in *Nollan* of the principles applicable to this case highlights the lack of a

nexus between the Loop and Gwinnett 316's development:

> The evident constitutional propriety disappears, however, if the *condition substituted* for the prohibition utterly *fails to further the end advanced as the justification* for the prohibition. . . . [T]he lack of nexus between the condition and the original purpose of the building restriction converts that purpose to something other than what it was. The purpose then becomes, quite simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation.

483 U.S. at 837 (emphasis supplied).

"[U]nless the permit condition serves the same government purpose as the developmental ban, the building restriction is not a valid regulation of land use but an 'out-and-out plan of extortion.' " *Nollan*, 483 U.S. at 837 (cit. omitted.) The state courts found as a matter of fact that Gwinnett 316 had been unjustly singled out to bear the burden of financing the Loop by a contribution of property. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 166 (1980) (citing *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). The financial limitations on the County and the City caused by the explosion of growth and the inability or unwillingness of the governments to adequately tax the population to support proposed public improvements were the reasons for requiring Gwinnett 316 to give up the Loop Road acreage. (Order at 5 n.5 & 5-6, Petition App. "B" at 5a n.5 & 5a-6a.)

Public officials actively contended that the Subdivision Regulations required Gwinnett 316 to donate the Loop Road acreage to the public. For example, George Black, the County's chief administrator of traffic and road planning, wrote a letter to Gwinnett 316 declining to purchase the Loop Road acreage because the Subdivision Regulations required it to be donated. (T3. 288; Plaintiff's Ex. "18".) Additionally, the factual findings of the Petitioners attached to the Petition as Appendix E reveal that the Subdivision Regulations serve the public purpose of obtaining free land for the development of a costly but sorely needed road that would alleviate the general increase of traffic in and around the City. (*See* Petition App. E at 26a; Order at 6, Petition App. "B" at 6a.) These facts support a finding that the exaction of the eighteen acres was not imposed for the purpose of alleviating problems caused by Gwinnett 316's development, but rather, that the right of way condition was imposed to alleviate general traffic problems in areas other than in and around the Property. The *importance* of the unrelated public welfare advanced by the building of the Loop does not justify the imposition of these conditions on Gwinnett 316, "but positively militates against the practice." *Nollan*, 483 U.S. at 837 n.5.

The exaction imposed on an owner of a property interest must be reasonably related to the burden on the public caused by the owner's utilization of public services. *See Webb's Fabulous Pharmacies, Inc.*, 449 U.S. at 163 (state's retention of interest earned on money deposited into the court's registry was an unconstitutional taking

because the exaction of the fee was not reasonably related to the burdens and costs imposed on the courts by the suit.) The city "is free to advance its 'comprehensive program,' if it wishes, by using its power of eminent domain for this 'public purpose.' *See* U.S. Const. Amdt. 5; but if it wants an easement across [Gwinnett 316's] property, it must pay for it." *Nollan*, 483 U.S. at 841-42.

2. The Subdivision Regulations deprived Gwinnett 316 of all economically viable use of its land comprising the eighteen acres of right of way and the surrounding ninety acres remaining to be developed.

The state courts also properly applied the second part of the regulatory takings analysis, providing that a taking in violation of the Fifth and Fourteenth Amendments occurs if a landowner is deprived of the economic value in its land by the application of the regulation. First, there is no doubt that the Subdivision Regulations deprive Gwinnett 316 of all viable economic use for the eighteen acres lying in the right of way. This Court's decision in *Lucas v. South Carolina Coastal Council* is applicable to the extent it stands for the proposition that the deprivation of the economic value in land effects a taking. 112 S. Ct. 2886, 2894 (1992). "[W]hen the owner of real property has been called upon to sacrifice *all economically beneficial uses in the name of common good, that is, to leave its property economically idle, he has suffered a taking.*" *Id.* at 2895 (additional emphasis supplied). In the instant case, there is no dispute that the City's Subdivision Regulations require Gwinnett 316 to leave an eighteen acre strip of right of why, bisecting the middle of its development,

fallow and undeveloped. Furthermore, because this acreage is part and parcel of the Property securing Gwinnett 316's mortgage, Gwinnett 316 is forced to continue paying interest and principal for the Property purchased in 1985 without having the right to economically use its land for any purpose whatsoever.

Although the City argued to the trial court that Gwinnett 316 still had the right to use the right of way land for "grazing," "grading" or, "clearing" purposes, these purposes are not viable options for Gwinnett 316 and were frivolously argued. Grading or clearing of the land is not a land use without the right to develop the land after it is graded and cleared and would only prepare the land for the public's use for the Loop. Also, grazing animals on the right of way land winding along the right of way acreage, which sits on a ridge top bisecting Gwinnett 316's industrial distribution warehouse development within the primary city in one of the fastest growing suburban areas in the United States, is not a viable use of the Loop Road acreage.

The state courts also found that the Subdivision Regulations deprived Gwinnett 316 of its use of over ninety additional acres surrounding the Loop Road. (Order at 5, Petition App. "B" at 6a.) The Loop Road would sit on a ridge winding through the development and as planned precludes the large sized warehouses in which Gwinnett 316 specializes. (*Id.*; T3. 52.) The road's elevation is such that the large trucks using the warehouses could not access the highway even if access were provided, which it is not. (Order at 5-6, Petition App. "B" at 6a; T1. 77-80; T3. 173-74 & 52.) Gwinnett 316 thus lost its use for these

ninety acres after the Subdivision Regulations were adopted and applied to it.[6]

B. The Subdivision Regulations Effect a Taking of Gwinnett 316's Land Under a Physical Invasion Analysis.

Not only do the facts of this case show a regulatory taking, but they would also support the finding of a taking of the eighteen acres of the right of way by physical invasion. *Cf. Yee v. City of Escondido, California,* 112 S. Ct. 1522, 1528 (1992) (rent control ordinance did not amount to physical invasion). A physical taking occurs where a landowner is required *"to submit to the physical*

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[6] Given the destruction of Gwinnett 316's development wrought by the Subdivision Regulations, the decision in *Penn Central Transportation Co.*, cited by Petitioners, is factually inapposite to the facts of the present case. 438 U.S. 104. In *Penn Central,* there was no conditioning of further development upon the dedication of a property interest to the public, *id.*; the property rights affected by the New York City law at issue could be transferred to the neighboring parcels, *id.* at 137; the governmental authority had not denied the owner of the property the right to occupy the air space above the terminal as a whole, but only the right to build a particular size structure in a 50-story air space, *id.* at 136-37; the rights at issue did not involve the owner's right to use a whole physical part of the acreage of the land, but rather focused on a segment of the bundle of property rights that were appurtenant to the physical acreage (the air space), *id.* at 130-31; the owner's property was not singled out arbitrarily for less favorable treatment than neighboring property as present in the instant case, *id.* at 132; and the regulations at issue did not interfere with the present uses of the property as is true in the instant case, *id.* at 136.

occupation of his land." Id. (Emphasis supplied.) The application of the Subdivision Regulations requires as a condition of development or permit approval that Gwinnett 316 reserve the Loop Road acreage exclusively for public use and dedicate the right of way to the City or County without compensation. Gwinnett 316 cannot build in the Loop right of way under the Subdivision Regulations in any circumstances; it must reserve the right of way on the sketch plat submitted for approval to the public, and it must dedicate the acreage forever to public use.

Under Georgia law, the City's Subdivision Regulations have been applied to attempt to force the dedication of an easement for road purposes to the public. The simple act of platting land pursuant to an ordinance and publicly filing the plat can constitute a completed dedication of an easement to the public for future rights of way shown on the plat. *Kinney v. Brown*, 216 S.E.2d 798 (Ga. 1975); *see Griffith v. C&E Builders, Inc.*, 200 S.E.2d 874 (Ga. 1973) (platting of streets pursuant to similar Gwinnett County Subdivision Regulations created easements in the public and in the purchasers of subdivision lots). This rule applies whether or not the governmental authority has graded or cleared the right of way land. *Kinney*, 216 S.E.2d at 798. The dedication of an easement to the public occurs as a matter of law. *See Northpark Assocs. No. 2 v. Homart Dev. Co.*, 414 S.E.2d 214 (Ga. 1992) (county's subjective testimony regarding the character of its rights in such roadways was irrelevant). Thus, the public would physically occupy an easement in the right of way for the Loop Road as a legal consequence of Gwinnett 316's reservation of the right of way on the plat.

The categorical distinction based on the physical invasion/regulatory takings classifications of cases rests partly on the temporal concept of the length of the occupation of the space invaded by the government. *Lorreto*, 458 U.S. at 427. While a temporary occupation of land may not be a taking, it is a taking, however, when the physical character of the land is occupied without temporal limitation. *Id.* at 427-28. "[T]he government does not simply take a single 'strand' from the 'bundle' of property rights: it chops through the bundle, taking a slice of every strand. A regulatory taking on the other hand, is based on a regulation 'that merely restricts the use of property.' " *Id.* at 430. By forcing Gwinnett 316 to do an act that amounts to the forced dedication of the eighteen acres of right of way, the City has taken the whole bundle of rights with respect to these eighteen acres, and even the City may not disclaim the effect of the dedication. *Kinney*, 216 S.E.2d at 799. *See Kaiser Aetna v. United States*, 444 U.S. 164, 180 (1979) (imposition of navigational servitude for public use constituted a taking even if it only amounted to the required dedication of an easement).

CONCLUSION

For the foregoing reasons, Respondent Gwinnett 316 Associates respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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